Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, as amended	)	
	)	

REPLY COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

INTRODUCTION

The Commercial Internet eXchange Association (CIX) is a trade association that represents 125 Internet Service Provider (ISP) networks that handle approximately 75 percent of the United States', and much of the world's, backbone Internet traffic.[1] CIX is the world's oldest trade association of ISPs and Internet-related businesses, having been established in 1991 to provide the first commercial access point to the Internet backbone. CIX, by its attorneys, files

[1] The views expressed herein are those of CIX as a trade association, and are not necessarily the views of each individual member.

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REPLY COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

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this Reply in response to comments filed in response to the Commission's *Public Notice*[2] regarding the United States Court of Appeals for the District of Columbia Circuit remand of the Commission's Non-Accounting Safeguards Orders.[3] In particular, the Commission requested comment on specific issues raised by a petition for judicial review filed by the Bell Atlantic telephone companies (n/k/a the Verizon telephone companies) and US West, Inc., (n/k/a Qwest Communications International, Inc.) (collectively the "Petitioners") in response to the Commission's *Accounting Safeguards Order* and, to an extent, the Commission's *Third Reconsideration Order*.[4]

In response to the Commission's request, BellSouth Corporation ("BellSouth"), Qwest Communications International Inc. ("Qwest"), SBC Communications ("SBC"), and the Verizon telephone companies ("Verizon") (collectively the Bell Operating Companies ("BOCs")) have filed comments essentially repeating the arguments that first appeared in the petition for judicial

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2 *Comment Requested in Connection with Court Remand of Non-Accounting Safeguards Order*, Public Notice, CC Docket No. 96-149, DA 00-2530, rel. Nov. 8, 2000 ("*Public Notice*").

3 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*"); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Third Order on Reconsideration, 14 FCC Rcd 16299 (1999) ("*Third Reconsideration Order*").

4 *See Bell Atlantic Telephone Companies and Qwest Communications International, Inc. v. Federal Communications Commission and the United States of America*, Brief for Petitioners, *Case No. 99-1479 (consolidated with Case No. 00-1004)*, United States Court of Appeals for the District of Columbia Circuit (Sep. 1, 2000).

review filed by the Bell Atlantic telephone companies (n/k/a Verizon) and US West, Inc., (n/k/a Qwest).

Also responding to the Commission's request, AT&T Corporation, ("AT&T"), the Commercial Internet eXchange ("CIX"), the Competitive Telecommunications Association ("CompTel"), the Information Technology Association of America ("ITAA"), Level 3 Communications, LLC ("Level 3"), Cox Communications, Inc. ("COX"), Focal Communications Corporation ("Focal"), and WORLDCOM, Inc. ("WORLDCOM") filed comments in this proceeding. These parties make a number of arguments strongly opposing the BOCs' proposed interpretation and use of the term "interLATA information service." CIX believes that in light of these comments and the discussion below, it is clear that the arguments opposing the BOCs' proposal have the greater merit and legal substance, and provide solid support for the Commission's resolution of this inquiry.

It appears that all of the commenters agree that Section 271(a)[5] prohibits BOCs and their affiliates from providing interLATA services, except as specifically authorized in the remainder of Section 271.[6] The BOCs argue, however, that the scope of that prohibition is limited to the provision of telecommunications by virtue of the Act's definition of "interLATA service" which states that "interLATA service means telecommunications between points in two different

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[5] 47 U.S.C. § 271; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; 47 U.S.C. §§ 151 *et seq.* (the "Act").

LATAs."[7] Specifically, the BOCs maintain that the Section 271 prohibitions do not apply when a BOC is providing interLATA information service because "information services and telecommunications are mutually exclusive." As discussed below, this argument cannot withstand legal scrutiny because it relies upon an intentional misreading of the language and construction of the 1996 Act, and clearly conflicts with the Congressional intent embodied therein. Consequently, the Commission should reject the BOCs' argument and confirm that BOCs may not provide in-region interLATA information services without first complying with the requirements of Sections 271 of the Act.

DISCUSSION

I The BOCs claim that they are not engaged in the provision of interLATA services when they are engaged in the provision of interLATA information services.[8] This assertion is wrong and is premised upon a fundamental misinterpretation of the words of the Act.

(Footnote continued from previous page)

[6] As discussed in CIX's Comments, the BOCs formerly argued that Section 271 also precludes BOC provisioning of interLATA information services. CIX Comments at 4-5.

[7] 47 U.S.C. § 153(21).

[8] *See e.g.* Qwest Comments at 5, SBC Comments at 2-3.

The term "interLATA services" encompasses *both* interLATA telecommunications and information services. As correctly noted in WORLDCOM's Comments, the Act's "interLATA services" definition is substantially based upon the definition for "interexchange telecommunications" contained in the Modification of Final Judgment ("MFJ")."[9] The D.C. Circuit held in the *Gateway Services Appeal* that the MFJ's prohibition on BOC provision of "interexchange telecommunications services" precluded the BOCs from providing information services bundled with interLATA telecommunications.[10] In that case, Bell Atlantic, joined by several other BOCs, argued that its "Gateway Service" did not constitute an interexchange service because the interexchange telecommunications component of the service was not separately identified or charged to the customers, but was bundled with the overall gateway service.[11] The Court appropriately characterized the BOC's argument as "rather strained," and observed that, if the BOCs' arguments were correct: "interexchange service, no matter how extensive, could be provided by the BOCs by simply packaging that service with some other noninterexchange telecommunications *or even nontelecommunications service*" (emphasis added). The Court concluded that such an interpretation "would create an enormous loophole in the *core restriction* of the decree" (emphasis added). Consequently, it is clear that the MFJ's

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[9] WORLDCOM Comments at i, 3-4.

[10] *United States v. Western Elec. Co.*, 907 F.2d 160, 162-63 (D.C. Cir. 1990) ("*Gateway Services Appeal*").

[11] *Id.i* at 163.

restrictions on the BOCs' provision of interLATA services were intended to apply to BOC provision of interLATA *nontelecommunications* services, such an interLATA information services.

II The BOCs' strained arguments in the instant matter amount to no more than another attempt to "create an enormous loophole in the core restriction" of Section 271.

The BOCs fundamentally argue in this instance that the use of the term "telecommunications" in the definition of the term "interLATA service" has a limiting effect, precluding the application of BOC interLATA service provisioning restrictions upon interLATA information services.[12] The crux of the BOC's argument is that, because the Commission has previously stated (albeit in a very different context) that "telecommunications" and "information services" are mutually exclusive, when an entity provides information service, it can not be providing telecommunications.[13] As it applies to the BOCs, this premise is wholly incorrect, and defies the D.C. Circuit's clear statements regarding BOC bundling of interLATA telecommunications and nontelecommunications service, such as interLATA information services.

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[12] *See e.g.* BellSouth Comments at 9 ("Congress could have, but did not, bring 'information services' within the scope of Section 271").

[13] *See e.g.* SBC Comments at 3.

The Act clearly states that information services are offered "*via* telecommunications."[14] Thus, information services and telecommunications are inextricably tied by the reference to telecommunications in the information services definition. It is certainly plausible that Congress was well aware of the *Gateway Services Appeal* when drafting the Act. Cognizant of the BOCs' arguments in that proceeding, Congress may have sought to make explicit that BOCs could not escape regulatory restraints by bundling information services with their interLATA telecommunications. By connecting, but still subjugating, the telecommunications component through use of the word "via," Congress was able to maintain the important distinction between information services and telecommunications for other purposes, such as the imposition of common carrier regulations or universal service obligations. Congress did not, however, intend that BOCs should be able to offer interLATA services prior to competition opening their local monopolies.

Moreover, if Congress had intended that "information service" did not include a "telecommunications" component, it would certainly not have made a clear reference to the term "telecommunications" in its information service definition.[15] Rather, it is reasonable to conclude that Congress chose to include the clarification "via telecommunications" to emphasize that telecommunications are an important, although not wholly defining, component of an

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[14] 47 U.S.C. § 153(20).

[15] 47 U.S.C. § 153(20).

information service. Through this tailored construction, Congress indicated that telecommunications are an important aspect of information services for specific regulatory purposes, such as Section 271 restrictions. It is clearly unreasonable, however, to conclude that Congress would have made the effort to emphasize that information services are provided *by way of* telecommunications, yet have intended that the telecommunications component was wholly inconsequential to the provision of information services in all instances.[16] Consequently, the Commission should reject BOC arguments that Congress intended to use the word "telecommunications" to exempt interLATA information services from the scope of Section 271.

Finally, the Commission is well aware of the important difference between telecommunications and telecommunications services, yet it seems that this point is worth repeating in the context of this proceeding.[17] "Telecommunications" is the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content.[18] "Telecommunications service," is the offering of telecommunications for a fee directly to the public, or to such classes or users as to be effectively

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[16] By the same token, the reference to "via" also affirms that information services are distinguishable from telecommunications.

[17] The Commission's distinction between information services and telecommunications was intended to clarify the appropriate application of Universal Service charges, not to exempt the provision of interLATA information services from Sections 271 and 272. By the same token, the BOCs are misinterpreting the Commission's 1998 Report to Congress, which was not intended to preclude the application of Section 271 to BOC interLATA information services. *See* BellSouth Comments at 6; Qwest Comments at 3-5.

[18] 47 U.S.C. § 153(43).

available directly to the public, regardless of the facilities used. Thus, "telecommunications" is merely the transmission of information between points. Telecommunications *services*,[19] however, are provided by telecommunications *carriers*.[20] Telecommunications carriers may be subject to common carrier regulation. Information services are provided *via* telecommunications, but information service providers do not provide "telecommunications services," and are not, nor should be, regulated as common carriers.[21]

III. The BOCs' arguments in this proceeding contradict their prior statements to the Commission and conflict with accepted canons of statutory construction.

As AT&T described in its Comments, in contrast their arguments in this proceeding, Verizon and Qwest have previously argued that "interLATA information services clearly fall within the Act's definition of 'interLATA services' because . . . interLATA information services must include telecommunications that cross LATA boundaries."[22] BellSouth has also made similar arguments before the Commission.[23] Nevertheless, the BOCs allege that the construction of Sections 271 and 272 also implies that the term "interLATA service" was not

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[19] 47 U.S.C. § 153(46).

[20] 47 U.S.C. § 153(44).

[21] Federal Communications Commission Report to Congress (1998).

[22] AT&T Comments at 14-16.

[23] *Id.*

meant to include "interLATA information services," but only describes "interLATA telecommunication services." This sudden about-face belies the BOCs' unabashed willingness to make any expedient argument in pursuit of their own ends. It is truly a shame that, as a result of the BOCs' relentless attempts to frustrate competition and circumvent the pro-competition intent of the 1996 Act, the Commission, competitive telecommunications carriers and ISPs, and other interested parties, must expend their scarce resources defending against the BOCs' relentless attacks upon the underpinnings of competition, rather than pursuing competition and the deployment of innovative and advanced communications services.

Generally accepted canons of statutory construction indicate that textual integrity is an important factor when determining the true meaning of a statute. In particular, statutory interpretation is a "holistic" endeavor,[24] and each statutory provision should be read with reference to the whole act.[25] Moreover, individual statutory provisions should be interpreted in a manner that is consistent with the necessary assumptions of the other provisions[26] and

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[24] *See Smith v. United States*, 113 S.Ct. 2050, 2057 (1993).

[25] *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 523 (1993); *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120, 123-24 (1989); *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989).

[26] *See Gade v. National Solid Waste Management Ass'n*, 112 S.Ct. 2374, 2384 (1992).

structure of the statute.[27] Finally, the statute should not be interpreted in a manner that leads to the creation of exceptions in addition to those specified by Congress.[28]

As further discussed below, the BOCs nevertheless argue that the Commission should interpret the Act's information services definition with no notice of the goals and intent of the act: the creation of competition in the telecommunications industry, and the specific mechanism created by Congress in support of that goal: barring BOCs from the provision of interLATA services, except for those specifically excepted in Section 271(g), until they have opened their local markets to competition.

A. Section 271(g)'s reference to "incidental interLATA services" clearly indicates that Section 271 applies to interLATA information services.

For instance, SBC argues that the inclusion of certain information services among the "incidental interLATA services" listed in Section 271(g), does not actually indicate that "information services" fall within the purview of "interLATA services."[29] Rather, SBC argues that the specific exception of certain interLATA information services from the general prohibition against interLATA services is merely a "belt and suspenders" approach by which the legislature sought to make the exclusion of all interLATA information services from Section 271

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[27] *See Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 668-69 (1990); *Gwaltney of Smithfield Ltd., v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987).

[28] *See United States v. Smith*, 499 U.S. 160, 166-67 (1991).

abundantly clear.[30] To support this illogical proposition, SBC argues that Congress included "extra, unnecessary" language in the Act merely to assure that Section 271(a) prohibitions were not interpreted in a "mistakenly expansive" manner. This argument does not agree with the canons of statutory construction described above. Moreover, SBC neglects to provide supporting legislative history, or any other basis for this proposition. Rather, SBC maintains that that assumption is "[t]he only fair inference." If so, then SBC has a rather selfish concept of what is fair. The only fair inference of this argument is that SBC has detected a glaring flaw in its argument, and has made a poor attempt at explaining it away. Like many a poor excuse, this argument has done more to highlight, rather than hide, the fundamental defect in the BOC's reasoning.

Contrary to SBC's assertions, Section 271(b)(3) specifically authorizes the BOCs to provide certain, "incidental interLATA services" that had been previously barred under the MFJ but are permitted under the 1996 Act. Section 271(g) provides a comprehensive list of these "incidental interLATA services." This list includes two specific interLATA information

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(Footnote continued from previous page)

[29] SBC Comments at 4.

[30] *Id.*

services,[31] clearly indicating, *inclusio unius est exclusio alterious*,[32] that they are the only exceptions to an otherwise complete bar to BOC provision of interLATA information services. Thus, the reasonable conclusion is that the Act's list of specific exceptions to Section 271 prohibitions clearly indicates that the unlisted BOC prohibitions remain intact, at least until affirmatively removed through the Commission's determination of a BOC's Section 271 compliance. SBC's arguments, however, clearly contradict principles of legal construction as described above. If Congress had intended to eliminate completely, rather than carve narrow exceptions to, the bar to BOC provision of interLATA information services, it would not have so carefully defined those exceptions. Indeed, it is much more likely that Congress would have made an affirmative statement to such effect had it truly intended to remove such an important aspect of the restrictions on BOC behavior that have been in place since the MFJ.

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[31] Specifically, BOCs may provide "two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools" and "a service the permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities . . . in another LATA. 47 U.S.C. §§ 271(g)(2), (4).

[32] The inclusion of one is the exclusion of another. This doctrine holds that where law expressly describes the particular situation to which it applies, an irrefutable inference must be drawn that what is excluded was intended to be excluded. *O'Melviney & Meyers v. FDIC*, 114 S.Ct 2048, 2054 (1994); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 730-31 (1989); *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 133-34 (1989); *Kevin McC. v. Mary A.* 123 Misc.2d 148, 473 N.Y.S.2d 116, 118 (19__).

B. The effect of the telecommunications component of an information service does not change whether the information service provider is transmitting services over its own or another carriers' facilities.

In its *Public Notice*, the Commission asked if the provider of an information service may be deemed to be providing telecommunications to the extent that it is using telecommunications.[33] The Commission also asked if the analysis of the issue changes if the information service provider is transmitting services over its own telecommunications facilities rather than using facilities obtained from other carriers.[34] Qwest purports that Section 271 permits BOCs to provide interLATA information services where the BOC is not a facilities-based carrier of the transmission component of the service.[35] It is puzzling that Qwest would choose to pursue this argument, considering US West's (n/k/a Qwest) lack of success with a similar argument only last year. Specifically, in *US West v. FCC*, the D.C. Circuit ruled in favor of an inclusive interpretation of interLATA services that bears upon this inquiry.[36] That case upheld the Commission's finding that a plan under which US West and Ameritech (n/k/a SBC) would market long distance service provided by Qwest, which was not at that time a BOC, in return for which Qwest would compensate US West and Ameritech via a fixed fee for each

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[33] *Public Notice* at 2.

[34] *Id.*

[35] Qwest Comments at 8.

[36] *See US West v. FCC*, 177 F.3d 1057, 1058 (D.C. Cir. 1999).

customer obtained, violated Section 271.[37] In that case, US West and Ameritech argued that the Commission had erroneously ascribed an over-expansive meaning to the word "provide" by interpreting Section 272(g)(2) as a bar to the BOC's marketing of interLATA services offered by a non-affiliated carrier.[38] In upholding the Commission's Order finding that the BOCs' marketing of an unaffiliated interLATA services constituted the "provision" of interLATA services in violation of Section 271, the Court specifically noted that the Commission's inclusive interpretation of the word "provide" was "clearly reasonable in the context of [Section] 271."[39]

Judged according to the Court's interpretation of the word "provide" in the context of the co-marketing relationships at issue in *US West v. FCC*, it is clear that BOC provisioning of interLATA information services coupled with their functional telecommunications monopoly constitutes the "provision" of interLATA telecommunications for the purposes of Section 271, regardless of whether or not the BOC is the facilities-based provider of the underlying telecommunications component. The applicability of Section 271 is even more clear when the information service provider is utilizing the telecommunications capability of its own facilities, as any BOC can do. Based on the Court's reasoning in *US West v. FCC*, it also appears that the provision of interLATA services using facilities obtained from other carriers constitutes the

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[37] *Id.*

[38] *Id.* at 1058-60.

[39] *Id* at 1059-60.

"provision" of interLATA telecommunications for the purposes of Section 271.[40] Consequently, ownership of the underlying telecommunications facilities has no bearing upon the application of Section 271 restrictions upon BOCs seeking to provide interLATA information services.

Furthermore, in the *US West/Qwest Merger Order*,[41] the Commission rejected the concept that, for the purposes of Section 271, the "provision" of interLATA telecommunications service is strictly limited to the act of transmitting information, and noted that it had previously rejected the same argument in the context of the *AT&T v. Ameritech Order*,[42] which it characterized as "the seminal order interpreting what it means to 'provide' interLATA services for purposes of Section 271."[43] Specifically, the Commission noted that in the *AT&T v. Ameritech Order*, the Commission was particularly concerned that the BOC's involvement in the long-distance market would enable them to accrue competitive advantages, reducing their

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40 The Court explained any inconsistency between the use of the word "provide" in this context and the usage of that word in other parts of the statute, stating that "although we normally attribute consistent meanings to statutory terms, [i]dentical words may have different meanings where the subject-matter to which the words refer is not the same . . . or [where] the conditions are different. *Id.* at 1060, (quoting *Weaver v. USIA*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) (internal quotation omitted).

41 *See Qwest Communications International Inc., and US West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 99-272, 15 FCC Rcd 5376 ("*US West/Qwest Merger Order*").

42 13 FCC Rcd at 21464-466.

43 *See US West/Qwest Merger Order* 15 FCC Rcd at 5382, para. 13.

incentive to open their local markets to competition.[44] In the *US West/Qwest Merger Order*, the Commission stated that it would "balance several factors, including, but not limited to, whether the BOC obtains *material benefits* (other than access charges) uniquely associated with the ability to include *a long distance component in a combined services offering*, whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service" (emphasis added). Finally, the Commission concluded that it would consider the "totality of [the BOC's] involvement" rather than focus on any single aspect of the BOC's proposed activity.[45]

CONCLUSION

In this case the BOCs' attempt to focus on the presence of the word "telecommunications" in the Act's information service definition is no more than a brazen attempt to forestall telecommunications competition, particularly in the advanced services sector. The Commission need look no further than its prior orders, the decisions of the D.C. Circuit, and the prior arguments of the BOCs themselves to find ample support for its position that Section 271 restricts apply to BOC provision of interLATA information services.

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[44] *See US West/Qwest Merger Order*, 15 FCC Rcd at 5383, para. 13; *AT&T v. Ameritech*, 13 FCC Rcd at 21467, para. 40.

[45] *US West/Qwest Merger Order*, 15 FCC Rcd at 5385-86.

CIX urges the Commission to continue to maintain its vigilance and support for competition in the telecommunications markets. Consequently, for the reasons discussed above, the Commission should confirm that Section 271 prohibitions apply to BOC provision of interLATA information services. By doing so, the Commission will help to ensure that the incentives that Congress created to compel BOCs to open their local facilities to competition will be given their full effect and maintained until they have fulfilled their intended purpose.

Respectfully submitted,

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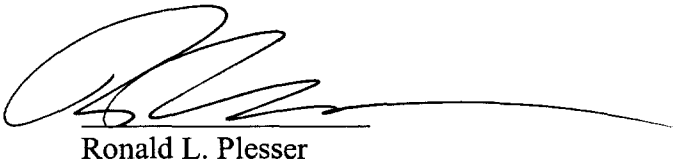

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